IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11944 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDABAD SOUTH INDIAN ASSO. CHARITABLE TRUST

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR KA PUJ for Petitioner

MR AKIL KURESHI FOR MR MANISH R BHATT & Co. for Respondents No. 1, 2

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 22/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. M/s M.R.Bhatt & Co. waives service of rule on behalf of the respondents. With the consent of the learned counsel for the parties, the petition is taken-up for final disposal today.

2. In this petition under Article 226 of the Constitution, the petitioner which is a public charitable Trust and which is also an assessee under the Income-tax Act, has challenged the decision contained in the letter dated 16th October, 2000 (Annexure-H to the petition) issued by respondent no.1 - Deputy Commissioner of Income-tax, Central Circle 1(3), Ahmedabad, refusing to issue Income-tax Clearance Certificate under section 230A(1) of the Income-tax Act, 1961 (hereinafter to be referred to as "the Act").

3. The petitioner-Trust has contended that the petitioner is an assessee under the Act and has been filing returns of income regularly and its assessments upto Assessment Year 1998-99 have been completed. It is further submitted that the income of the petitioner-Trust is exempted under the provisions of the Act and there is no outstanding liability as on today against the petitioner-Trust. The petitioner-Trust has given details about the educational activities of the Institutions being run by the petitioner-Trust. The petitioner intends to expand its educational activities and, therefore, is desirous of constructing three more floors on the building wherein it runs a school. The petitioner, therefore, approached Indian Overseas Bank, Thaltej Branch, Ahmedabad for grant of term loan facility to the tune of rupees one crore for additional construction as aforesaid. Vide letter dated 26th October, 1999, the Bank informed the petitioner-Trust about sanction of the term loan subject to the terms and conditions mentioned in the said letter. Thereafter, on 28th October, 2000, the Bank further sanctioned additional term loan of Rs. 150 lakhs under the terms and conditions mentioned in the letter dated 28.10.2000. One of the said conditions requires the petitioner-Trust to obtain Income-tax Clearance Certificate and production of the same before the Registrar so as to complete the mortgage facilities and to get the mortgage deed released from the Sub-Registrar's Office. The petitioner also applied to the Charity Commissioner, Gujarat State, who has granted permission to mortgage the Trust property for the purpose of obtaining the term loan facility from the Indian Overseas Bank. The petitioner has also executed a memorandum of depositing documents of title relating to

its property in question with an intent to create an equitable mortgage in favour of the Bank. Since the said memorandum of mortgage is required to be registered, the petitioner is required to obtain Income-tax Clearance Certificate. The petitioner, therefore, submitted an application under section 230A(1) of the Act in the prescribed form. The Assessing Officer sought further information, which has been supplied by the petitioner-Trust. The petitioner-Trust clarified that the petitioner-Trust is not selling the property in question, but is only mortgaging it to Indian Overseas Bank - a Nationalised Bank as security against loan. The petitioner has further submitted that such a mortgage does not amount to a transfer as envisaged under section 269U(A) of the Act. Respondent no.1, however, rejected the application vide letter dated 6.10.2000 on the ground that the petitioner's case is not covered within the meaning of section 17 of the Indian Registration Act, 1908 and the application submitted by the petitioner was not in accordance with law. The petitioner vide letter dated 16.10.2000 informed respondent no.1 that its case was covered under section 17(b) of the Registration Act and memorandum of depositing title deed was required to be registered. Hence, the petitioner is required to produce Income-tax Clearance Certificate. Respondent no.1, however, instead of acceeding to the petitioner's request, passed an order under section 281-B of the Act provisionally attaching the property in question. Hence, the petitioner has approached this Court for issuance of an appropriate writ directing the respondent-authority to issue Income-tax Clearnace Certificate. The petitioner has also challenged the order of provisionally attaching the property in question.

4. In response to the notice issued by this Court, affidavit-in-reply has been filed by respondent no.1 contending that there was survey carried out at the petitioner's premises and cash donation receipts were found and that the property of the petitioner-Trust bearing S.P.No.1-A, Survey No.403 of Village Bodakdev, District : Ahmedabad City is required to be attached to protect the interest of the Revenue and that accordingly, with the approval of the competent authority, the said property has been provisionally attached. It is, therefore, submitted that such an order having been passed under section 281B of the Act, the certificate as prayed for cannot be issued.

5. At the hearing of this petition, Mr. K.A.Puj, learned counsel for the petitioner has submitted that at present there is no outstanding income-tax liability

against the petitioner-Trust and, therefore, respondent no.1 is not justified in refusing to issue Income-tax Clearnace Certificate. Strong reliance has been placed on the decision of this Court in GOPAL INDUSTRIAL ESTATE AND OTHERS v. INCOME TAX OFFICER, WARD-E (REVENUE), BHAVNAGAR AND OTHERS, (1980) 123 ITR 727 and also on the decision dated 12.10.2000 rendered by this Court in Special Civil Application No. 9572/2000 and cognate matters.

It is further submitted that without giving-up the petitioner's challenge to the order of provisional attachment of the property in question, the petitioner has already offered another property being land and building in Survey No.403, Final Plot No.1/B situated at village Bodakdev and that as per the Valuer's report, the value of the said property is Rs. 71,72,430/-. It is submitted that the necessary application offering the said property has already been given by the petitioner to respondent no.1 on 11th January, 2001.

6. On the other hand, Mr.Akil Kureshi, learned counsel for the Revenue has submitted that the authorities have initiated proceedings under section 133A and 158BD of the Act, which may result into liability of the petitioner to pay a large amount of tax dues and, therefore, the authorities are justified in withholding the grant of Income-tax Clearance Certificate. So far as the application dated 11th January, 2001 is concerned, the learned counsel for the Revenue states that the application is still under consideration.

7. In Rejoinder, Mr. Puj, learned counsel for the petitioner submits that the petitioner has been waiting for the Income-tax Clearance Certificate for quite sometime and for want of such a certificate, the petitioner-Trust is not getting further disbursement of loan from the Bank. It is also submitted that the offer contained in the application dated 11.1.2001 was already made at the hearing on 26.12.2000.

8. We have heard the learned counsel for the parties. The learned counsel for the petitioner appears to be right in contending that the issuance of Income-tax Clearance Certificate ought not to have been withheld by the respondent-authorities only on the ground that some liability may be fixed on the petitioner-Trust in future. The petitioner's contention is supported by the decision in the case of GOPAL INDUSTRIAL ESTATE AND OTHERS (Supra), wherein this Court has held that section 230A of the I.T.Act, 1961, has been enacted as a part of the

machinery for collection and recovery of the income-tax and other taxes. It is an aid to the recovery of taxes when they become due, in the sense of assessment orders having been passed and the exact amount of tax due from a particular assessee in respect of a particular year having been determined. It is only after the tax liability has thus been determined that the recovery proceedings under the I.T.Act can be started. It is to assist the machinery for recovery of tax dues that S.230A has been enacted and the object of the legislature in enacting S.230A is to see that the immovable properties, which would be otherwise available for attachment and ultimate realisation of the tax dues of the person concerned, are not transferred away leaving the tax authorities without any recourse to such immovable properties. Recovery of any existing liability as set out in S. 230A(1)(b) can only refer to recovery of a tax which has already been assessed under the assessment machinery functioning under the respective taxation statue. Unless the tax liability has been finally determined by an assessment order, there cannot be recovery of any existing liability. Under these circumstances, it is obvious that s. 230A(1)(b) refers to recovery of an existing liability arising from an order of assessment passed under the respective taxation statutes being one of the statutes set out in s. 230A(1)(a). Thus, the words "existing liability" in sec.230A(1)(b) would mean existing liability to pay tax under an order of assessment already passed under the relevant taxation statute. Under cl.(a) of s.230A(1) similar words "existing liability" are used by the legislature.

In view of the admitted position that on the date of filing of the petition and even till today, there is no order passed by any authority fixing any tax liability on the petitioner-Trust, respondent no.1 was not justified in not issuing Income-tax Clearance Certificate.

9. However, as regards the grievance against provisional attachment of the property in question, which is also the subject matter of the mortgage with the Bank, learned counsel for the petitioner has challenged the said order which is supported by the learned Counsel for the Revenue. It is however, not necessary to go into the said controversy at this stage, as the petitioner-Trust has already offered its another property for provisional attachment as per the application dated 11th January, 2001 along with a copy of Valuer's report. The report indicates that the area of land in question is 406.41

sq.mts., which is situated near Sunrise Shopping Centre, Opp: Drive-in-Cinema, Thaltej, Ahmedabad and it bears Survey No.403, Final Plot No.1/B. The land has been valued at Rs. 20,32,050/-. The land has also built-up area of 856.73 sq.mts. which has been valued at Rs. 51,40,390/-. As per Valuation Report dated 24.7.1998, the total value of the property is Rs. 71,72,430/-. The life of the property is expected to be 60 years.

10. In view of the aforesaid offer made by the petitioner and the statement that the property is unencumbered and in view of the fact that neither the said statement nor the Valuation Report submitted by the petitioner is challenged or controverted by or on behalf of the respondents, it appears to us that the interests of justice require us to direct the respondents to issue Income-tax Clearance Certificate under section 230A(1) of the Act after releasing the provisional attachment over the land and building on land bearing S.P.No.1-A, Survey No.403, village Bodakdev in District & Sub-District : Ahmedabad and instead provisionally attach the land (with building) bearing Survey No.403 Final Plot No.1/B situated near Sunrise Shopping Centre, Opp: Drive-in-Cinema, Thaltej, Ahmedabad.

11. It is accordingly directed as under :-

(i) Respondent no.1 shall provisionally attach the land (with building) bearing Survey No. 403,Final Plot No.1/B, situate near Sunrise Shopping Centre, Opp: Drive-in-Cinema, Thaltej, Ahmedabad in lieu of the provisional attachment over the land and building on land bearing SP No.1-A, Survey No. 403, village Bodakdev, in District & Sub-District : Ahmedabad, which property shall be released from provisional attachment.

(ii) Respondent no.1 shall issue Income Tax Clearance Certificate in favour of the petitioner-Trust under section 230A(1) of the Act.

These directions shall be carried out within two weeks from the date of receipt of writ of this Court or a certified copy of this judgment.

Rule is made absolute accordingly, with no order as to costs.

(J.M.Panchal,J.) (M.S.Shah, J.)

(patel)